

# McNamara Declaration

## Exhibit 121

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

HACHETTE BOOK GROUP, INC.,  
HARPERCOLLINS PUBLISHERS LLC,  
JOHN WILEY & SONS, INC., and  
PENGUIN RANDOM HOUSE LLC,

Plaintiffs,

vs.

No. 1:20-cv-04160-JGK

INTERNET ARCHIVE and DOES 1  
through 5, inclusive,  
Defendants.

\_\_\_\_\_ /

VIDEOTAPED RULE 30(B)(6) DEPOSITION OF INTERNET ARCHIVE  
BY LILA BAILEY

Volume 1

Remote Zoom Proceeding  
San Francisco, California  
Monday, October 18, 2021

REPORTED BY:

LESLIE ROCKWOOD ROSAS, RPR, CSR 3462

Pages 1 - 142

Job No. 4841846

1 MR. GRATZ: Why don't we go -- why don't we go  
2 off the record and figure out when to come back.

3 MS. MCNAMARA: Okay.

4 THE VIDEOGRAPHER: Okay. We're going off the  
5 record the time is 11:43 a.m.

6 (Recess.)

7 THE VIDEOGRAPHER: The time is 12:08 p.m., and  
8 we are back on the record.

9 Q. BY MS. MCNAMARA: Okay. So, Lila, I think when  
10 we cut off, we were turning to the issue of Michelle Wu  
11 acting as counsel for Internet Archive. Okay?

12 A. Yes.

13 Q. So did there come a point in time where Michelle  
14 Wu was retained as counsel for Internet Archive?

15 A. Yes.

16 Q. And can you tell me when that occurred?

17 A. Sometime in 2017.

18 Q. Now we've looked at your privilege log, and you  
19 have indicated that there were attorney-client  
20 communications with Michelle Wu as of September 15, 2016.

21 Does that change your answer?

22 A. That could be right as well.

23 Q. So obviously, if the privilege log is correct,  
24 she was acting as counsel in September of 2016; is that  
25 right?

1 Q. Did you have an understanding as, given the  
2 prior retention of Ms. Wu, why it was decided seven,  
3 eight months later to formalize the retention?

4 MR. GRATZ: Lacks foundation.

5 THE WITNESS: I think that decision would be  
6 privileged.

7 Q. BY MS. MCNAMARA: Okay. Had the role of the  
8 retention changed between 2015 and March of 2017?

9 MR. GRATZ: Objection. Calls for  
10 attorney-client privileged information.

11 I instruct the witness not to answer.

12 Q. BY MS. MCNAMARA: Did that retention agreement  
13 last -- how -- strike that.

14 How long did the retention agreement last?

15 A. So I don't recall exactly what it said in the  
16 letter about the duration. However, I can say that, you  
17 know, Michelle Wu would periodically offer legal advice  
18 to the Internet Archive, either to me or directly  
19 Brewster for at least a year or so following, maybe more,  
20 following that retention letter.

21 Q. So that would have been at least until March,  
22 April, May of 2018?

23 A. At least, yeah, at least until then. That  
24 sounds about right.

25 Q. Do you have any reason to believe it extended

1 Dave's white paper. So I feel like I should -- I should  
2 stop talking here.

3 Q. Have you heard -- and by "Kyle and Dave," you  
4 mean Kyle Courtney and Dave Hansen; is that correct?

5 A. That's right.

6 Q. They're -- they're the fellow band of supporters  
7 of Internet Archive or Friends of the Internet Archive;  
8 is that right?

9 A. I would describe Kyle Courtney and Dave Hansen  
10 and Michelle Wu as Friends of the Internet Archive.

11 Q. Okay. So have you heard Mr. Courtney or  
12 Mr. Hansen give a presentation on their white paper to  
13 libraries?

14 A. I have at the Library Leaders Forum that was  
15 held in the San Francisco Public Library, which was the  
16 2019 one.

17 Q. And did -- in the course of giving that  
18 presentation, would they go through the risk mitigation  
19 factors?

20 A. Kyle likes to talk about buckets of risk, and  
21 Dave likes to talk about mission risks, which are the  
22 risks associated with not doing Controlled Digital  
23 Lending or, you know, living up to a library's mission.  
24 I don't remember if they like walked through each  
25 recommendation in the white paper or not. That specific

1 Q. And so it's -- it's a different organization  
2 from the Authors Guild; is that correct?

3 A. Yes.

4 Q. Are you familiar with the Authors Guild?

5 A. I am.

6 Q. And you're familiar with the -- that the Authors  
7 Guild has not supported Controlled Digital Lending; are  
8 you not?

9 MR. GRATZ: Objection. Lacks foundation,  
10 outside the scope.

11 THE WITNESS: I am aware that the Authors Guild  
12 has written a number of things that say they don't agree  
13 with the idea of Controlled Digital Lending.

14 Q. BY MS. MCNAMARA: Now there came a time, did  
15 there not, where there was a May 23 to 24, 2017 meeting  
16 of a number of lawyers, intellectual property lawyers,  
17 concerning Controlled Digital Lending?

18 A. There was a meeting.

19 Q. How did that meeting come to pass?

20 A. Pam Samuelson convened a group scholars and also  
21 library practitioners. It was modeled after a meeting  
22 that she did around the Google Books case.

23 Q. What does that mean?

24 A. I don't know enough about that, that meeting. I  
25 just know that that's what Pam said. She was like, well,

1 we did this for Google; it would be interesting to do it  
2 here.

3 Q. Do you know what precipitated -- I mean, the  
4 Google Books, there was a litigation pending. What  
5 precipitated having a meeting in May of 2017 concerning  
6 Controlled Digital Lending, to your knowledge?

7 A. I believe it was -- oh, like having to do with  
8 the MacArthur -- the MacArthur Grant Challenge.

9 Q. How did it relate to the MacArthur Grant  
10 Challenge?

11 A. One of the significant barriers to solving -- so  
12 let me back up and say the framing of the MacArthur  
13 100&Change Grant Challenge is solving one of the world's  
14 largest problems or something like that.

15 And as part of the grant proposal, barriers to  
16 solving the problem are identified. One of the  
17 significant barriers to libraries being able to loan out  
18 their digital collections was copyright -- copyright  
19 uncertainty, lack of clarity in the law.

20 I believe that Pam was an advisor on the grant,  
21 like among the advisors, as I was, as Michelle was, and  
22 she wanted to basically have an open discussion, an  
23 academic discussion with other scholars and library  
24 practitioners who understood how libraries were engaging  
25 in this practice, which, again, at the time was not

1 called Controlled Digital Lending, but we've been over  
2 that.

3 Q. And was one of the goals to mitigate the legal  
4 opposition to what became Controlled Digital Lending?

5 A. No. The real goal of that meeting was academic  
6 inquiry. It was -- I guess you could say or I would say  
7 the one -- among the ways that Pam Samuelson formulates  
8 her opinions on subjects of this nature where it's --  
9 there is something going on out in the world that is  
10 legally untested, is she likes to talk to other academics  
11 about it.

12 And so she was in charge of the list of who --  
13 who was there and the agenda for the meeting and how it  
14 was run.

15 Q. And the topic, the legally untested topic was  
16 what became known as Controlled Digital Lending; isn't  
17 that right?

18 A. The subject was -- yes, digital -- what became  
19 known as Controlled Digital Lending.

20 MS. MCNAMARA: Okay. So let's have marked as  
21 Exhibit 59 the flier for the tab 49, Jesse, for the May  
22 27th meeting.

23 (Exhibit 59, Open Libraries Copyright Scholars  
24 Meeting, May 24, 2017, San Francisco, CA,  
25 INTARC00151183 - 185, marked for identification



1 by counsel electronically.)

2 Q. BY MS. MCNAMARA: Are you familiar with this  
3 presentation concerning the May 24th, 2017 copyright  
4 scholars meeting?

5 MR. GRATZ: Objection to the form.

6 THE WITNESS: I have actually not seen this  
7 before.

8 Q. BY MS. MCNAMARA: Okay. So you'll see that  
9 there's a list of attendees on -- or the participants on  
10 the second and third page of this exhibit.

11 A. Uh-huh.

12 Q. Is that right?

13 A. Yes.

14 Q. And so amongst the attendees there is Brewster  
15 Kahle, obviously of Internet Archive, Corynne McSherry of  
16 the Electronic Frontier Foundation, your counsel, one of  
17 your counsel on this case, David Hansen from Duke, as  
18 well as the one and only Joe Gratz, who is there.

19 MS. MCNAMARA: Is that -- is that a lovely  
20 picture of you, Joe, sitting next to Kyle Courtney?

21 MR. GRATZ: It is a picture of me, but it is not  
22 a lovely picture of me. I think it was taken during  
23 lunch.

24 MS. MCNAMARA: I am correct that you are sitting  
25 next to one of the fellow travelers, Mr. Courtney; is

1       that right?

2               MR. GRATZ: In that picture, I am sitting next  
3       to Mr. Courtney. I don't remember whether I was sitting  
4       next to Mr. Courtney all day.

5               MS. MCNAMARA: Okay.

6               MR. GRATZ: But also -- yeah.

7               Q. BY MS. MCNAMARA: Okay. So obviously he's  
8       pictured, but he's also identified as a participant, Kyle  
9       Courtney. And then you were there, Lila Bailey?

10              A. I was there.

11              Q. Mary Minow, Michelle Wu, and Pam Samuelson, was  
12       the whole gang.

13              And I understand that these were pulled together  
14       as 20 copyright experts in the area relevant to kind of  
15       the topic of the conference, the Controlled Digital  
16       Lending; is that right?

17              MR. GRATZ: Objection to the form.

18              THE WITNESS: Well, that is definitely what it  
19       says here. Let me get familiar with this document.

20              So, okay, sorry, ask your question. Because  
21       really this is the first time I'm seeing this document.

22              Q. BY MS. MCNAMARA: Okay. Well, as you see on the  
23       first page, the caption to the photograph that is on the  
24       bottom right of that, which is a little blurry so -- at  
25       least on my --

1 A. Yeah.

2 Q. -- rendering. That's Michelle Wu at the bottom  
3 left; is that right?

4 A. I'm sorry, which photo are we looking at?  
5 They're very fuzzy.

6 Q. Yes. The photo that is the group of people on  
7 the first page of the exhibit. That's at the bottom.

8 A. Michelle, no. Michelle is --

9 Q. Oh, I see Michelle. She's to the right of Pam  
10 Samuelson in that middle photo.

11 A. Yeah, she's to Pam's right.

12 Q. Yes, okay.

13 A. Yes.

14 Q. So the caption on this bottom photo is "20 of  
15 the nation's top copyright scholars."

16 Do you see that?

17 A. I see that.

18 Q. Okay. Did you -- did Ms. Samuelson include any  
19 copyright lawyers who represent content creators at this  
20 panel?

21 MR. GRATZ: Objection to the form.

22 THE WITNESS: I don't know if -- I mean, they're  
23 primarily professors and library practitioners. I  
24 have -- I don't know if any of these people in other  
25 capacities may have represented any content creators. I

1 can certainly say I know Corynne McSherry has represented  
2 content creators, but I don't know if we'd agree on that  
3 term.

4 Q. BY MS. MCNAMARA: Okay. Do you know whether any  
5 papers or articles were distributed prior to the  
6 conference in connection with the conference?

7 A. I don't remember. That was -- I've been a part  
8 of a couple these things that Pam has pulled together,  
9 these kind of roundtable discussions, and usually there  
10 is reading that goes along with it, but I don't know what  
11 she pulled together for this.

12 Q. Do you know whether Michelle Wu's 2016 or 2017  
13 articles that we have identified at the deposition,  
14 whether they were distributed at the conference or before  
15 the conference?

16 A. I don't remember.

17 Q. Do you know whether they were discussed at the  
18 conference?

19 A. Not in any kind of detail that I recall.

20 Q. Do you know whether Mr. Gratz made any kind of  
21 presentation at the conference?

22 A. He did not.

23 Q. Did he speak at the conference?

24 A. I -- the thing I remember for all of me and Joe  
25 and Corynne was stating at the top of the meeting that we

1 had -- had represented the Internet Archive and were  
2 conscious of privilege issues and were mostly there to  
3 listen.

4 Q. BY MS. MCNAMARA: And is that, in fact, what you  
5 did?

6 A. That is, in fact, what I did, and that is what I  
7 recall both Joe and Corynne doing.

8 Q. Do you know whether the meeting was taped?

9 A. It was not.

10 Q. Do you know whether -- did you or anybody else  
11 from the Internet Archive that was present, so that would  
12 be you and Mr. Kahle and Jim Michalko and John Gonzalez  
13 and -- I think those are all the representatives of the  
14 Internet Archive at the conference or the meeting.

15 Do you know whether any of those individuals  
16 took notes of the meeting?

17 A. I did take notes. I will -- I would like to  
18 state that with the exception of me, everyone else from  
19 the Internet Archive was only there for the first hour.

20 Q. Okay. So have you retained the notes that you  
21 took at that meeting?

22 A. They were paper notes and I -- no, I don't  
23 believe I still have them.

24 Q. Do you know when, if you discarded them, when  
25 did you discard them?

1           A.   Probably in the three to six months after the  
2 meeting, as I no longer needed them.

3           Q.   Why would -- why would you no longer need them  
4 three to six months after the meeting?

5           A.   It's not in my practice to go back to old notes  
6 from old meetings.

7           Q.   Okay. Do you have a distinct recollection of  
8 discarding those notes or are you guessing?

9           A.   I mean --

10           MR. GRATZ: Objection to the form.

11           THE WITNESS: I have a distinct recollection of  
12 them being paper notes, and I know that I have a practice  
13 of shredding my paper notes on a relatively regular  
14 basis. You can see I have a small home office so I  
15 regularly purge.

16           Q.   BY MS. MCNAMARA: As a result of that 2017  
17 meeting that was organized by Pam Samuelson, was it  
18 agreed that Mr. Courtney and Mr. Hansen would author a  
19 white paper concerning the legality of Controlled Digital  
20 Lending?

21           A.   No. At that point, at the end of the meeting --  
22 so at the end of the meeting, what I remember is Pam  
23 saying something like whoever is interested in writing  
24 something else about this should let the group know, that  
25 kind of a thing.

1           And then after the meeting had concluded and we  
2           were having like a dinner afterwards, I believe that is  
3           when Kyle and Dave and Michelle and I started talking  
4           about the idea of writing something up.

5           Q.   And so was it agreed at that dinner that the  
6           primary authors of the paper would be Mr. Courtney and  
7           Hansen?

8           MR. GRATZ:   Objection.   Vague.

9           THE WITNESS:   The white paper idea came quite a  
10          bit later.

11          Q.   BY MS. MCNAMARA:   Tell me about that.   How did  
12          that come about?

13          A.   The original idea was to write something short  
14          and easy for a non-lawyer to understand about the legal  
15          underpinning of Controlled Digital Lending.

16          Q.   And that became the statement that you  
17          co-authored; is that right?

18          A.   That's right.   That became the Position  
19          Statement.

20          As that document crystallized, another kind of  
21          need was identified in the community.   Basically people  
22          were like -- would say, "My general counsel has  
23          questions, has more questions than this document  
24          answers."

25          And it was in light of that more lawyerly

1 STATE OF CALIFORNIA ) ss:

2 COUNTY OF MARIN )  
3

4 I, LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462, do  
5 hereby certify:

6 That the foregoing deposition testimony was  
7 taken before me at the time and place therein set forth  
8 and at which time the witness was administered the oath;

9 That testimony of the witness and all objections  
10 made by counsel at the time of the examination were  
11 recorded stenographically by me, and were thereafter  
12 transcribed under my direction and supervision, and that  
13 the foregoing pages contain a full, true and accurate  
14 record of all proceedings and testimony to the best of my  
15 skill and ability.

16 I further certify that I am neither counsel for  
17 any party to said action, nor am I related to any party  
18 to said action, nor am I in any way interested in the  
19 outcome thereof.

20 IN WITNESS WHEREOF, I have subscribed my name  
21 this 22nd ay of October, 2021.  
22

23   
24

25 LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462



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BY LILA BAILEY

Volume 2

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LESLIE ROCKWOOD ROSAS, RPR, CSR 3462

Job No. 4842007

1 the question -- as the question is phrased, I instruct  
2 the witness not to answer.

3 MS. MCNAMARA: Okay. I don't think that -- I  
4 mean, that it calls for attorney-client privilege or work  
5 product, but we can go through it methodically if that's  
6 easier.

7 Q. So, Ms. Bailey, one of the suggestions  
8 articulated in the white paper is that one way to -- a  
9 design feature that may reduce risks and enhance the  
10 fair-use position is to introduce additional artificial  
11 friction into the system, for example, by extending the  
12 time between digital lends more closely mirroring how  
13 physical books are lent and returned.

14 Do you see that?

15 A. Sorry, what page are we on here?

16 Q. Page 36 in the paragraph that begins: "One way  
17 is to introduce additional artificial friction."

18 A. So I was on the wrong page that's why I'm not  
19 seeing it. Okay. I see it now.

20 Q. Okay. Are you aware of what this means as to  
21 kind of introducing friction and introducing time between  
22 digital lends?

23 MR. GRATZ: Objection to the form.

24 THE WITNESS: I understand the principle.

25 Q. BY MS. MCNAMARA: Okay. Is that a practice

1 followed by Internet Archive? Do they introduce friction  
2 between lends so there's a time period between when a  
3 book is returned and when it can be checked out again?

4 A. Not to my knowledge.

5 Q. A second suggestion by the authors of the white  
6 paper is that in the next paragraph, you'll see it says:  
7 "A conservatively designed CDL system could also  
8 introduce characteristics that mimic physical  
9 degradation. For example, a library might introduce  
10 lending limits based on library experience with physical  
11 lending. If a physical book could be expected to  
12 circulate 2000 times before it degrades, the library  
13 could place the same limit on circulation of the digital  
14 copy."

15 Do you see that?

16 MR. GRATZ: Objection to the form.

17 THE WITNESS: I see that.

18 Q. BY MS. MCNAMARA: Is that a practice followed by  
19 Internet Archive? Do they take a book out of circulation  
20 after it is determined that it might be consistent with  
21 how a physical book would degrade?

22 MR. GRATZ: Objection to the form.

23 THE WITNESS: Not to my knowledge.

24 Q. BY MS. MCNAMARA: The -- on page 37 of the white  
25 paper, there is a paragraph that begins: "Libraries may

1 also limit who they will lend digital copies to as an  
2 additional way to limit the overall reach of the copy and  
3 therefore the potential market effect."

4 Do you see that?

5 A. I see that.

6 Q. And it goes on to recognize that some libraries  
7 serve particular communities of users, and so it could  
8 restrict lending to the communities of users that it  
9 serves.

10 Do you understand that as an idea that is being  
11 put forth by the authors of the white paper as a means to  
12 reduce risk?

13 MR. GRATZ: Objection to the form.

14 THE WITNESS: I do understand the principle.

15 Q. BY MS. MCNAMARA: And I am correct, am I not,  
16 that Internet Archive is a global website; isn't that  
17 right?

18 MR. GRATZ: Objection to the form.

19 THE WITNESS: The Internet Archive -- so  
20 Archive.org is a website that is accessible from anywhere  
21 in the world.

22 Q. BY MS. MCNAMARA: And that's true of the  
23 Controlled Digital Lending component of Internet Archive;  
24 isn't that right?

25 A. It is accessible from anywhere in the world,

1       yes.

2           Q.   So anywhere in the world, someone could lend a  
3       book?

4           MR. GRATZ:  Objection to the form.

5           Q.   BY MS. MCNAMARA:  Or could take out a book, I  
6       should say.

7           A.   Anyone who has an account with the Internet  
8       Archive can borrow a book.

9           Q.   Okay.  So turning now to page 38 of the white  
10       paper, do you see under the subhead B, "Collection  
11       Choices," the first sentence reads:  "The choice in what  
12       books are selected for CDL can also play a significant  
13       role in risk mitigation."

14                  Do you see that?

15           A.   I do.

16           Q.   And proceeds to say:  "The book candidates with  
17       the lowest risk and the strongest fair-use argument,  
18       though those analyses are not necessarily tied together,  
19       are generally those with the lowest likelihood of market  
20       exploitation."

21                  Do you see that?

22           A.   I see that.

23           Q.   So, for example, the article goes on to indicate  
24       that old books and books in the public domain would be  
25       less risky under this analysis; correct?

1 MR. GRATZ: Objection to the form.

2 THE WITNESS: Yeah. The paper talks about older  
3 books, public domain books posing a lower risk.

4 Q. BY MS. MCNAMARA: And Internet Archive's  
5 practice of Controlled Digital Lending is not limited to  
6 public domain books, is it?

7 A. It is not.

8 Q. So it circulates books that are in copyright?

9 MR. GRATZ: Objection to the form.

10 THE WITNESS: Circulates -- I'm sorry, the  
11 Internet Archive circulates books that are very likely --  
12 at least some of them are likely to be protected by  
13 copyright.

14 Q. BY MS. MCNAMARA: Okay. And there's a chart  
15 that appears on page 39, or a diagram that appears on  
16 page 39 of the white paper, and it divides the kind of  
17 universal books into pre-1943 books, pre-1963 books,  
18 pre-1989 books, and books first published in the United  
19 States, and it ascribes different risk analysis to those  
20 different categories.

21 Do you understand that?

22 MR. GRATZ: Objection. Misstates the content of  
23 the document.

24 THE WITNESS: I understand that there are --  
25 this is what Kyle called buckets of risk.

1 Q. BY MS. MCNAMARA: Okay. So on page 40, there's  
2 a subcategory of out-of-print and off-the-market books.

3 Do you see that?

4 A. I see that.

5 Q. Now we've established that Internet Archive  
6 publishes books that are still protected by copyright;  
7 isn't that right?

8 MR. GRATZ: Objection to the form.

9 THE WITNESS: Did you mean to use the word  
10 "publishes"?

11 Q. BY MS. MCNAMARA: Well, it distributes, it makes  
12 available to -- to -- to its users books that are in  
13 copyright; isn't that right?

14 MR. GRATZ: Objection to the form.

15 THE WITNESS: Books that may be protected by  
16 copyright are included in our Controlled Digital Lending  
17 environment.

18 Q. BY MS. MCNAMARA: And does the Internet Archive  
19 have any time restriction on -- on books that it will not  
20 publish or will not make available to its readers?

21 MR. GRATZ: Objection to the form.

22 THE WITNESS: The Internet Archive does place a  
23 limit based on a date for books that are made available  
24 through our Controlled Digital Lending system.

25 Q. BY MS. MCNAMARA: And what is that limit?

1           A. Currently, I believe it is the last two years or  
2 five years. I realize I'm not confident in my answer  
3 there.

4           Q. Okay. So it's either two years or five years.  
5 And by that, means two years or five years from the date  
6 of original publication?

7           A. No -- oh, wait, sorry. I'm getting myself  
8 turned around. Can you restate the question?

9           Q. Yes.

10                  Does Internet Archive place a time restriction  
11 on books that are available on its -- on its Internet  
12 Archive lending website?

13           A. Yes.

14           Q. What is that time restriction?

15                  MR. GRATZ: Outside the scope.

16                  You can answer.

17                  THE WITNESS: So I am not 100 percent certain of  
18 the date cutoff as I sit here today. I don't --

19           Q. BY MS. MCNAMARA: I have seen indications  
20 that -- that books that were published, originally  
21 published within the last five years, are generally --  
22 but there's exceptions -- are generally not to be made  
23 available to the lending portion of the Internet Archive.

24                  Does that sound correct to you?

25           A. It does sound correct to me, although again,



1 that exact where that cutoff is -- is something that I  
2 recognize that I am -- I don't have my head around today.

3 Q. Okay. Okay. So back on page 40, under  
4 out-of-print and off-the-market books. Do you agree that  
5 Internet Archive does not limit what is available on its  
6 lending library to out-of-print books?

7 A. The Internet Archive does not limit its lending  
8 library to books that are out -- are determined to be out  
9 of print.

10 Q. And similarly, it does not limit its lending  
11 library to books that are off the market.

12 MR. GRATZ: Objection. Vague.

13 Q. BY MS. MCNAMARA: Correct?

14 A. So if I'm reading the paper correctly, off the  
15 market is something closer to orphan works?

16 Q. I don't think so. So let's try to clarify  
17 because I think your counsel was probably right. It was  
18 vague as said. So let's clarify it as to how it's being  
19 used in the white paper.

20 In the third sentence of the subsection 2 under  
21 out of print and off the market, the paper indicates that  
22 a key, though not necessarily determinative factor in  
23 fair use, is whether or not the work is available to the  
24 potential user. If the work is out of print or  
25 unavailable for purchase through normal challenges" --

1 "channels, the user may have more justification for  
2 reproducing it."

3 Do you see that?

4 MR. GRATZ: Objection. Objection to the form of  
5 the question.

6 THE WITNESS: That's -- sorry, yeah, it looks  
7 like this is trying to quote something, but I don't see  
8 where the beginning of the quote is in the paper. I  
9 think there's a typo in the paper. I'm just noticing as  
10 we read it here today. But I do see that.

11 Q. BY MS. MCNAMARA: Okay.

12 A. Yes.

13 Q. And so does Internet Archive limit the books  
14 that are available through its lending library to books  
15 that are unavailable for purchase through normal  
16 channels?

17 MR. GRATZ: Objection to the form.

18 THE WITNESS: The Internet Archive does not  
19 limit works -- sorry. The Internet Archive does not  
20 limit the availability of works in its lending library by  
21 whether they are unavailable for purchase through normal  
22 channels.

23 Q. BY MS. MCNAMARA: Okay. And we've already  
24 established -- this goes on to talk about orphan works.  
25 We've already established that Internet Archive does not

1 limit the availability of works on its lending library to  
2 orphan work; isn't that right?

3 A. That is right.

4 Q. Okay. Then -- and I'm -- and I'm cognizant of  
5 the time. I know that we're supposed to try to keep to  
6 hour increments, and so I'm almost done so I don't think  
7 want you to think I'm being disrespectful of your time.

8 On page 41, there's a subhead 3: "Nonfiction  
9 and Factual Works."

10 A. I see that.

11 Q. Do you see that?

12 A. I do.

13 Q. It says: "Finally, a third collection  
14 characteristic that may reduce risk and enhance the  
15 fair-use position is for libraries to focus their CDL  
16 efforts on works that are nonfiction or primarily  
17 factual.

18 Do you see that?

19 A. I see that.

20 Q. Does Internet Archive in its lending library  
21 limit the books that are either nonfiction or primarily  
22 factual?

23 MR. GRATZ: Objection to the form.

24 THE WITNESS: The Internet Archive lending  
25 library is not limited to works that are only nonfiction

1 or factual.

2 MS. MCNAMARA: Okay. This is a good time to  
3 break. So how much time -- where are we in your schedule  
4 of kind of what we so here?

5 MR. GRATZ: So we have, by my count, we've been  
6 on the record for about five hours and 53 minutes. So  
7 we've got about another hour and seven minutes to go.

8 Lila, do you want to take a -- take a longer  
9 break now and then, you know, go through to the finish  
10 line or a shorter break now and break it up into pieces,  
11 or how would you prefer to proceed?

12 THE WITNESS: Are we still on the record?

13 MR. GRATZ: We should probably go off the  
14 record.

15 THE WITNESS: Yes.

16 THE VIDEOGRAPHER: We're going off the record.  
17 The time is 11:53 a.m.

18 (Recess.)

19 THE VIDEOGRAPHER: The time is 12:45, and we are  
20 back on the record.

21 MS. MCNAMARA: Okay. Thank you for that.

22 Q. So, Lila, I wanted to turn our attention, if I  
23 may, to Mary Minow. I think we haven't really discussed  
24 Ms. Minow. We've referenced her, but we haven't  
25 discussed her in any detail.

1 STATE OF CALIFORNIA ) ss:

2 COUNTY OF MARIN )  
3

4 I, LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462, do  
5 hereby certify:

6 That the foregoing deposition testimony was  
7 taken before me at the time and place therein set forth  
8 and at which time the witness was administered the oath;

9 That testimony of the witness and all objections  
10 made by counsel at the time of the examination were  
11 recorded stenographically by me, and were thereafter  
12 transcribed under my direction and supervision, and that  
13 the foregoing pages contain a full, true and accurate  
14 record of all proceedings and testimony to the best of my  
15 skill and ability.

16 I further certify that I am neither counsel for  
17 any party to said action, nor am I related to any party  
18 to said action, nor am I in any way interested in the  
19 outcome thereof.

20 IN WITNESS WHEREOF, I have subscribed my name  
21 this 25th day of October, 2021.  
22

23   
24

25 LESLIE ROCKWOOD ROSAS, RPR, CSR NO. 3462